

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-207653

DATE: October 19, 1982

MATTER OF: Alan L. Crouch

## DIGEST:

1. GAO has no basis upon which to object to the rejection of the protester's bid as nonresponsive where agency determined that a letter from a bank stating that a standby letter of credit would be delivered to the Government upon acceptance of the bid was not an adequate bid guarantee as required by the solicitation.
2. Fact that an agency may have accepted an improper bid guarantee in a prior procurement does not compel the agency to perpetuate the error by again accepting the same inadequate bid guarantee.

Alan L. Crouch, doing business as Crouch's Lawn Service, protests the rejection of its bid as nonresponsive for failing to provide a bid guarantee in the form of a firm commitment as required by invitation for bids (IFB) No. IFB-GS-11C-20164 issued by the General Services Administration (GSA). The protester also questions the award to a firm whose bid this year on the current six-month contract was higher than that firm's bid last year on a one-year contract. The protester suggests that all bidders may not have been bidding on an equal basis. We conclude that both grounds of protest are without merit and deny the protest.

The IFB was issued to obtain landscape maintenance and grass cutting services at the J.W. Powell Building in Reston, Virginia. As amended, the IFB required each bidder to submit a bid guarantee in the amount of 20 percent of the total bid price and stated that the bid guarantee was to be:

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"in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States."

When bids were opened, the protester's bid was the lowest of the three received. His bid was accompanied by a letter from Virginia National Bank, which read as follows:

"Please be advised that we have approved a standby letter of credit to cover 20% of contract bid, not to exceed \$15,000.00 in your favor for Crouch's Lawn Service. The bid is for the lawn maintenance contract at GSA-PBS J.W. Powell Building, Reston, Virginia.

The original letter of credit will be delivered to you upon acceptance of the bid submitted by Crouch's Lawn Service."

The letter was signed by an assistant vice president of the bank. The contracting officer declared the protester's bid nonresponsive for failure to provide an acceptable bid guarantee and made award to the second low bidder.

The protester argues that the letter he submitted with his bid was an irrevocable letter of credit that should have been acceptable as a bid guarantee. He says that the bank assured him that similar letters have been issued for other small businesses and no problems resulted. More importantly, says the protester, he used the same letter of credit last year and it was accepted by GSA. The agency counters that the letter submitted merely referred to a letter of credit that would be delivered only upon acceptance of the protester's bid. Because delivery of the actual letter of credit was conditioned upon acceptance of the protester's bid, the letter accompanying the bid did not constitute a firm commitment as required by

the bid guarantee clause.<sup>1</sup> GSA does not agree that the same letter was accepted last year. The agency states that it made no determination regarding the letter last year because the protester was then the fourth lowest bidder and did not receive the award.

A bid guarantee is a firm commitment that assures that a successful bidder will execute such contractual documents and provide such payment and performance bonds as may be required. Federal Procurement Regulations (FPR) § 1-10.102.2. When a bid guarantee is required as part of a bid, the failure to provide a guarantee will render the bid nonresponsive. Zemark International Construction Co., B-203020, May 12, 1982, 81-1 CPD 372. See also FPR § 1-2.404-2(f). This failure cannot be corrected, waived or excused unless one of the exceptions in FPR § 1-10.103.4 applies. None applies here.

The solicitation and the regulations state that a bid guarantee may take the form of an irrevocable letter of credit. FPR § 1-10.102.2. A letter of credit is essentially a third party beneficiary contract where a party desiring to transact business induces another, usually a bank, to issue a letter to a third promising to honor that party's drafts or

<sup>1</sup> There is also some indication in GSA's report on this protest that the use of the word "standby" in the bank's letter accompanying the protester's bid may have contributed to the determination that the letter of credit was merely conditional. We note, however, that the phrase "standby letter of credit" is a term of art. Unlike a commercial letter of credit, which functions as a financing device by obligating the issuer to pay in the ordinary course of a business transaction, a "standby" or "guarantee" letter of credit obligates the issuer to pay in the event of a default by the party on whose behalf the letter was issued. Pastor v. National Republic Bank of Chicago, 76 Ill. 2d 139, 390 N.E.2d 894, 897 (1979). See also D. Baird, "Standby Letters of Credit in Bankruptcy," 49 U. Chi. L. Rev. 130 (1982). Had the protester actually submitted a standby letter of credit, its bid would have been responsive to the requirement of a bid guarantee in the form of a firm commitment.

other demands for payment upon the third party's compliance with certain conditions. Juanita H. Burns and George M. Sobley, B-184331, December 18, 1975, 75-2 CPD 400. The effect of this arrangement is to substitute the bank's credit for that of the party at whose request the letter is issued. Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438. An irrevocable letter of credit satisfies the requirement of a firm commitment because it assures the Government of access to funds should a successful bidder fail or refuse to execute required contractual documents or to provide payment or performance bonds.

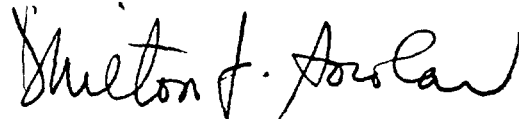
Here, we find that GSA reasonably concluded that the letter submitted with the protester's bid was not adequate under the terms of the solicitation. The protester did not submit a standby letter of credit with its bid, but submitted only a letter advising that such a letter had been approved and that the original letter of credit would be delivered to GSA upon acceptance of the protester's bid. By its terms, the bank's letter contemplated delivery at some future time of what the IFB specifically required to be submitted contemporaneously with the bid. Because the liability of an issuer of a letter of credit is controlled solely by the terms of the letter, East Girard Sav. Ass'n v. Citizens Nat'l Bank and Trust Co. of Baytown, 593 F. 2d 598, 602 (5th Cir. 1979), we believe the Government may properly insist upon submission of the actual letter of credit so that it might determine whether the terms of the letter satisfy the requirements of the solicitation. Because only material available at bid opening may be considered in making a determination of responsiveness, Fisher-Klosterman, Inc., B-185106, March 9, 1976, 76-1 CPD 165, we believe the GSA was reasonable in determining that the letter tendered with the protester's bid fell short of the IFB requirement of a firm commitment. Therefore, we have no basis upon which to object to the agency's rejection of the protester's bid as nonresponsive. Cf. Juanita H. Burns and George M. Sobley, *supra* (letter of credit not accompanied by requisite withdrawal application did not constitute a firm commitment). See also Colorado Elevator Service, Inc., B-206950.2, May 6, 1982, 82-1 CPD 434.

The fact that Crouch may have submitted a similar letter in a prior procurement is, as GSA states, meaningless. Crouch was not in line for award under the prior procurement and thus its bid guarantee was never evaluated. In any event, even if the guarantee had been erroneously accepted last year, the agency would not be compelled to perpetuate the error by again accepting the inadequate bid guarantee.

The protester also suggests that the awardee may have been bidding on the basis of a one-year contract although the protester was advised that the contract was to be for only six months. The primary basis for this contention is that the awardee's bid on this year's six-month contract was higher than its bid last year on a one-year contract.

As originally issued, the IFB stated that the starting date for services would be June 25, 1982, and that the contract would be for a period of one year. An amendment to the IFB was issued on April 27, however, stating that the term of the contract would extend to December 31, 1982, in lieu of a one-year contract. It thus appears that both parties knew that the term of the contract had been changed and were therefore competing on the same basis.

The protest is denied.



Acting Comptroller General  
of the United States